No. 15-420

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL BRYANT, JR.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Section 117(a) of Title 18 of the United States Code makes it a federal crime for any person to "commit[] a domestic assault within the special maritime and territorial jurisdiction of the United States or Indian country" if the person "has a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings for" enumerated domestic-violence offenses. 18 U.S.C. 117(a) (Supp. II 2014).

The question presented is whether reliance on valid, uncounseled tribal-court misdemeanor convictions to prove Section 117(a)'s predicate-offense element violates the Constitution.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 769 F.3d 671. The opinions accompanying the order of the court of appeals denying rehearing en banc (Pet. App. 34a-54a) are reported at 792 F.3d 1042. The oral ruling of the district court denying respondent's motion to dismiss the indictment (Pet. App. 22a-32a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 30, 2014. A petition for rehearing was denied on July 6, 2015 (Pet. App. 33a). The petition for a writ of certiorari was filed on October 5, 2015, and was granted on December 14, 2015. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional and statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-12a.

STATEMENT

Following a conditional guilty plea in the United States District Court for the District of Montana, respondent was convicted on two counts of domestic assault by a habitual offender, in violation of 18 U.S.C. 117(a). Pet. App. 3a. The district court sentenced him to 46 months of imprisonment, to be followed by three years of supervised release. J.A. 45-46. The court of appeals reversed the convictions and directed that the charges be dismissed because, the court held, the Constitution prohibited reliance on respondent's valid, uncounseled tribal-court misdemeanor convictions to prove Section 117(a)'s predicate-offense element. Pet. App. 1a-21a.

A. Statutory Background

1. "Indian tribes are 'distinct, independent political communities, retaining their original natural rights' in matters of local self-government." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 55 (1978) (quoting *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832)). Thus, when an Indian tribe conducts a criminal prosecution in tribal court for crimes occurring in Indian country, it "acts as an independent sovereign, and not as an arm of the Federal Government." *United States* v. *Wheeler*, 435 U.S. 313, 329 (1978); see *United States* v. *Lara*, 541 U.S. 193, 210 (2004). Because a tribe's power to enforce tribal law emanates from "retained tribal sovereignty," *Wheeler*, 435 U.S. at 323-324, tribal

prosecutions are not governed by provisions of the federal Constitution. *Santa Clara Pueblo*, 436 U.S. at 56 ("As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority."); see *Duro* v. *Reina*, 495 U.S. 676, 693 (1990) ("[T]he Bill of Rights does not apply to Indian tribal governments.").

Although the Constitution does not apply to tribal prosecutions, Congress has exercised its "broad general power[] to legislate in respect to Indian tribes," *Lara*, 541 U.S. at 200, by conferring a range of procedural safeguards on tribal-court defendants in the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. 1301 *et seq.* See *Santa Clara Pueblo*, 436 U.S. at 56-57. Under ICRA, a tribal-court defendant is guaranteed "due process of law" and has "the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him," to "have compulsory process for obtaining witnesses in his favor," and, for an offense punishable by imprisonment, to have a trial by jury. 25 U.S.C. 1302(a)(6), (8), and (10). ICRA also provides protection from compelled self-incrimination, unreasonable searches and seizures, double jeopardy, excessive bail, excessive fines, and cruel and unusual punishment. 25 U.S.C. 1302(a)(2)-(4) and (7). In addition, tribal-court defendants may seek habeas corpus review of their convictions in federal district court. 25 U.S.C. 1303.

ICRA requires tribal courts to provide counsel for indigent defendants who are sentenced to a term of imprisonment exceeding one year, but appointed

counsel is not required when a sentence of less than one year is imposed. 25 U.S.C. 1302(c)(2). Instead, a defendant in a misdemeanor prosecution has the right to the assistance of counsel at his own expense. 25 U.S.C. 1302(a)(6). ICRA's counsel provision thus differs from the Sixth Amendment. While the Sixth Amendment provides no right to appointed counsel in misdemeanor cases where only a fine is imposed, it does provide the right to appointed counsel in a misdemeanor prosecution that results in actual imprisonment. See *Scott* v. *Illinois*, 440 U.S. 367, 369, 373-374 (1979); *Argersinger* v. *Hamlin*, 407 U.S. 25, 37 (1972).

2. The Northern Cheyenne Tribe is a federally recognized Indian tribe in Montana with more than 10,000 enrolled members. See Northern Cheyenne Tribe, *Official Site of the Tsitsistas & So'taeo'o People* (2013), www.cheyennenation.com. The Tribal Constitution establishes three branches of government—legislative, executive, and judicial—and provides for the separation of powers. See Am. Const. and Bylaws of the Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation Art. XI (adopted May 31, 1996).[1]

The Tribe's Judicial Branch is composed of a Trial Court, Appellate Court, Constitutional Court, and Office of the Court Clerk. Law and Order Code of the Northern Cheyenne Tribe, Tit. I, § 1-1-4 (1998) (Tribal Code).[2] The Trial Court exercises general civil and criminal jurisdiction. *Id.* § 1-2-1. The Appellate Court "has exclusive jurisdiction to hear appeals and other

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[1] http://indianlaw.mt.gov/content/northerncheyenne/codes/2008_updated_law_and_order_code/attachment.pdf.

[2] http://indianlaw.mt.gov/northerncheyenne/codes/default.mcpx.

authorized requests for appellate review of Trial Court decisions." *Id.* § 1-2-2. The Constitutional Court has authority to remove judges and "has exclusive jurisdiction" over claims that legislative enactments of the Tribal Council violate the Tribal Constitution. *Id.* § 1-2-3.

The Tribe has adopted rules of criminal procedure "intended to provide for a fair trial and the just determination of every criminal proceeding" in tribal court. Northern Cheyenne R. Crim. P. 1(B) (Tribal Code, Tit. V). Criminal defendants are presumed innocent and may only be convicted if the evidence shows beyond a reasonable doubt that the defendant committed the charged crime. Rule 26(K)(2). Criminal defendants have "[t]he right to be present throughout the proceeding"; "[t]he right to know the nature and cause of the charge and to receive a copy of the complaint"; "[t]he right to meet the witnesses against [them] face to face"; "[t]he right to compulsory process"; "[t]he right to a speedy public trial and by an impartial jury if a prison sentence is possible"; and "[t]he right not to testify." Rule 22(A)(1)-(6). The Rules further provide that the defendant has the right "to defend himself in person, by lay counsel or professional attorney at his own expense." Rule 22(A)(1).

If a Northern Cheyenne tribal-court defendant chooses to plead guilty, the judge must personally address the defendant in open court to determine that the plea is informed, voluntary, and accurate. Rule 11(B)(1) and (4). The judge must explain and determine that the defendant understands his rights, including the "right to be represented at his own expense." Rule 11(B)(1)(b). The judge "shall not enter a judgment on a tendered plea of guilty without first

making an inquiry to satisfy himself that there is a factual basis for the plea." Rule 11(B)(4).

3. In 2006, in response to an epidemic of domestic violence against Indian women and to ensure that serial offenders would be held accountable, Congress enacted 18 U.S.C. 117(a), which makes it a federal crime for any person to "commit[] a domestic assault within the special maritime and territorial jurisdiction of the United States or Indian country" if the person "has a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings" for specified domestic-assault offenses. See Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA Reauthorization Act), Pub. L. No. 109-162, §§ 901, 902(3), 119 Stat. 3077-3078.[3] At the time of the events in this case, qualifying predicates included offenses equivalent to "assault, sexual abuse, or [a] serious violent felony against a spouse or intimate partner," as well as certain interstate domestic violence and stalking crimes. 18 U.S.C. 117(a)(1) (2006). The statute was later expanded to also include domestic violence offenses committed against "a child of or in the care of the person committing the domestic assault" as qualifying predicates. 18 U.S.C. 117(a)(1) (Supp. II 2014).

B. The Current Controversy

1. a. Respondent is an enrolled member of the Northern Cheyenne Tribe who lived on the Northern Cheyenne Indian Reservation during the time period

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[3] "Indian country" is defined in 18 U.S.C. 1151 to mean all land within any Indian reservation under federal jurisdiction, all dependent Indian communities, and all Indian allotments, the Indian titles to which have not been extinguished.

relevant to this case. Pet. App. 3a & n.2; J.A. 38. Respondent has more than 100 tribal-court convictions for various criminal offenses, including several misdemeanor convictions for domestic assault. See Presentence Investigation Report (PSR) ¶ 81. Specifically, between 1997 and 2007, respondent pleaded guilty on at least five occasions in the Northern Cheyenne Tribal Court to committing domestic abuse, in violation of Section 7-5-10 of Title VII of the Tribal Code. See PSR ¶¶ 26, 81.[4] In 1999, for example, respondent assaulted his live-in girlfriend by attempting to strangle her and hitting her on the head with a beer bottle. PSR ¶ 81. And in 2007, respondent beat up his girlfriend and kneed her in the face, leaving her bruised, bloodied, and with a broken nose. *Ibid.* The Tribal Court sentenced respondent to various terms of imprisonment for his repeated acts of domestic violence, never exceeding one year of incarceration. *Ibid.* Respondent did not seek federal habeas corpus review of any of his tribal-court convictions for domestic assault.

Respondent has alleged, and the courts below have assumed, that he was indigent and that he did not have access to appointed counsel at the time of his

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[4] Section 7-5-10 provides that "[a]ny person who purposefully, knowingly, recklessly, or negligently abuses their spouse, family member, or household member shall be prosecuted for committing the offense of domestic abuse." Tribal Code, Tit. VII, § 7-5-10(A). The provision contains graduated penalties intended to punish repeat offenders. See *id.* § 7-5-10(C) (providing that a first-time offender "shall be jailed for not less than 30 days and fined not less than $500.00," a second-time offender "shall be jailed for not less than 90 days and fined not less than $1,000.00," and a third-time offender "shall be jailed for not less than 180 days and fined not less than $2,000.00").

tribal-court convictions. See Pet. App. 5a & n.4. It is undisputed, however, that those convictions were valid when rendered and were obtained in compliance with ICRA. *Id.* at 7a-8a, 46a.

b. Respondent's pattern of domestic violence continued in 2011 with assaults on two different women. In February 2011, respondent attacked his live-in girlfriend in his home on the Northern Cheyenne Indian Reservation by dragging her off the bed, pulling her hair, and punching and kicking her. J.A. 38; see PSR ¶ 11 (quoting victim's affidavit stating that respondent had repeatedly abused her over a four-month period and that the violence escalated with the February 2011 attack). Three months later, in May 2011, respondent assaulted a different woman who was living with him on the Reservation. J.A. 38. Respondent woke her, yelled at her, and then choked her until she almost passed out. *Ibid.*

On May 9, 2011, federal and tribal law enforcement officers interviewed respondent about his recent acts of violence. PSR ¶ 28. During that interview, respondent admitted that he physically assaulted the woman involved in the February 2011 attack between five and six times. PSR ¶ 35. He recalled that he had "slapped [her] in the face several times" during the February 2011 assault and "punched [her] a few times," including "once to her chest which knocked her to the ground." PSR ¶ 34. Respondent further admitted that he had physically assaulted the victim of the May 2011 attack "on three separate occasions" during the two months they dated. PSR ¶¶ 28, 33. Respondent stated that he had "punched, slapped or choked" the victim during those attacks. PSR ¶ 33.

2. a. Based on the February and May 2011 assaults, a federal grand jury in the United States District Court for the District of Montana returned an indictment charging respondent with two counts of domestic assault by a habitual offender, in violation of 18 U.S.C. 117(a). J.A. 25-26. Respondent moved to dismiss the indictment, alleging that the use of his uncounseled tribal-court misdemeanor convictions to prove Section 117(a)'s predicate-offense element would violate the Fifth and Sixth Amendments. C.A. E.R. 27-29. The district court denied the motion. Pet. App. 32a. Respondent pleaded guilty to both counts in the indictment, reserving his right to appeal the denial of his motion to dismiss. J.A. 27-36.

b. In advance of sentencing, the Probation Office prepared a PSR. The PSR recommended a four-level enhancement to the base offense level for each violation of 18 U.S.C. 117(a) because respondent had repeatedly assaulted his victims and inflicted bodily injury on them. PSR ¶¶ 52, 58 (calculating enhancement pursuant to Sentencing Guidelines § 2A6.2(b)(1) (2010)). The PSR also summarized respondent's lengthy tribal-court record, including his multiple convictions for domestic assault. PSR ¶ 81. Respondent objected to a handful of facts in the PSR, but he did not dispute any aspect of his tribal-court record or the facts underlying the assaults that resulted in his Section 117(a) prosecution. See 4/27/12 Add. to PSR.

c. At sentencing, respondent confirmed that he had no further relevant objections to the PSR and that the district court "c[ould] rely upon the accuracy of the report." J.A. 41-42. The court calculated a total offense level of 21 for each Section 117(a) violation, which included a four-level enhancement under Sen-

tencing Guidelines § 2A6.2(b)(1) (2010) for causing bodily injury to and repeatedly assaulting the victims. J.A. 42-43. That offense level, combined with respondent's criminal history category of I, yielded a recommended Guidelines range of 37 to 46 months of imprisonment. J.A. 43. The court sentenced respondent to concurrent terms of 46 months of imprisonment on each count, to be followed by three years of supervised release. J.A. 45-46.

3. a. The court of appeals reversed. Pet. App. 1a-21a. The court held that the indictment must be dismissed because, in its view, the Sixth Amendment did not permit reliance on respondent's uncounseled tribal-court misdemeanor convictions to satisfy Section 117(a)'s predicate-offense element. *Id.* at 16a.

The court of appeals acknowledged that respondent's uncounseled tribal-court convictions were not constitutionally infirm because "the Sixth Amendment right to appointed counsel does not apply in tribal court proceedings." Pet. App. 7a. But the court stated that respondent's convictions "would have violated the Sixth Amendment had they been obtained in state or federal court" because respondent was incarcerated for his tribal offenses, and "indigent criminal defendants have a right to appointed counsel in any state or federal case where a term of imprisonment is imposed." *Id.* at 8a. The court found it "constitutionally impermissible" to use respondent's uncounseled tribal-court convictions as predicate offenses under Section 117(a) because the tribal court had not "guarantee[d] a right to counsel that is * * * coextensive with the Sixth Amendment right." *Id.* at 12a.

In so concluding, the court of appeals relied heavily on its prior decision in *United States* v. *Ant*, 882 F.2d 1389, 1395 (9th Cir. 1989), which had found it impermissible to use an uncounseled tribal-court guilty plea that resulted in imprisonment as evidence in a later federal prosecution arising out of the same incident. Pet. App. 10a-11a. The court acknowledged that *Ant* had cited *Baldasar* v. *Illinois*, 446 U.S. 222 (1980) (per curiam), in which a majority of a fractured Court held without agreeing on a rationale that "an uncounseled conviction that did not result in imprisonment—and therefore did not run afoul of the Sixth Amendment—could [not] be used in a subsequent prosecution under a recidivist statute." Pet. App. 9a, 13a. And the court recognized that this Court had subsequently overruled *Baldasar* in *Nichols* v. *United States*, 511 U.S. 738, 746-747 (1994), which held that an uncounseled state misdemeanor conviction that did not result in imprisonment *could* be used to enhance a sentence for a subsequent offense. Pet. App. 12a-13a. But the court believed that *Ant* "remains good law notwithstanding its citation to *Baldasar*." *Ibid.*

The court of appeals recognized that its decision created a conflict with two other circuits, both of which had "held that a prior uncounseled tribal court conviction could be used as a predicate offense for a [Section] 117(a) prosecution." Pet. App. 14a (citing *United States* v. *Shavanaux*, 647 F.3d 993, 997 (10th Cir. 2011), cert. denied, 132 S. Ct. 1742 (2012), and *United States* v. *Cavanaugh*, 643 F.3d 592, 603-604 (8th Cir. 2011), cert. denied, 132 S. Ct. 1542 (2012)). But the court disagreed with those decisions, believing they could not "be reconciled with *Ant*." *Id.* at 15a.

b. Judge Watford concurred. Pet. App. 16a-21a. He agreed that *Ant* "control[led] the outcome of" respondent's case, but wrote separately to explain why "*Ant* warrants reexamination." *Id.* at 16a-17a. As Judge Watford observed, "*Nichols* suggests that so long as a prior conviction isn't tainted by a constitutional violation, nothing in the Sixth Amendment bars its use in subsequent criminal proceedings." *Id.* at 17a. Judge Watford found it "odd to say that a conviction untainted by a violation of the Sixth Amendment triggers a violation of that same amendment when it's used in a subsequent case where the defendant's right to appointed counsel is fully respected." *Id.* at 17a-18a.

Judge Watford also explained that *Nichols* had "undermine[d] the notion that uncounseled convictions are, as a categorical matter, too unreliable to be used as a basis for imposing a prison sentence in a subsequent case." Pet. App. 17a. The view that "the right to appointed counsel is necessary to ensure the reliability of all *tribal* court convictions" therefore "denigrat[ed] the integrity of tribal courts." *Id.* at 19a-20a. Judge Watford observed that "respect for the integrity of an independent sovereign's courts should preclude [the] quick judgment" that uncounseled "tribal court convictions are inherently suspect and unworthy of the federal courts' respect." *Ibid.*

Judge Watford noted that *Ant* was also vulnerable to challenge in light of this Court's decision in *Lewis* v. *United States*, 445 U.S. 55 (1980), which held that an uncounseled felony conviction obtained in violation of the Sixth Amendment could be used as a predicate in a subsequent prosecution for being a felon in possession of a firearm. Pet. App. 18a. *Lewis* held that

"the mere fact of conviction, even if unreliable and unconstitutionally obtained, could be used to criminalize an act that might otherwise be lawful—firearms possession." *Id.* at 19a (citation and internal quotation marks omitted). Judge Watford thought it "illogical" to hold that, in contrast, "the 'mere fact' of a domestic violence conviction cannot be used to support punishment for an act that is already criminal—domestic violence." *Ibid.* As Judge Watford noted, it does not "imping[e] upon anyone's rights when [a legislature] prohibit[s] (or enhance[s] penalties for) domestic violence, since no one has the right to abuse a spouse or intimate partner to begin with." *Ibid.*

4. The court of appeals denied rehearing en banc, over the dissent of eight judges. Pet. App. 33a-54a.

a. Concurring in the denial of rehearing en banc, Judge Paez stated that *Nichols* should not be read to "permit[] the use of [respondent's] convictions as long as they do not violate the Sixth Amendment (which tribal court convictions, by definition, never do)." Pet. App. 34a. Judge Paez suggested that uncounseled tribal-court convictions present reliability concerns and that *Nichols*, which involved an enhancement under the federal Sentencing Guidelines, "leaves open the question" whether such a conviction "passes muster at the guilt phase." *Id.* at 36a.

b. Judge Owens dissented from the denial of rehearing en banc. Pet. App. 40a-43a. He observed that Congress enacted Section 117(a) to address "the grave problem of domestic violence on tribal lands." *Id.* at 40a. Respondent is precisely the kind of offender Congress intended Section 117(a) to cover, Judge Owens explained, because he had been convicted of domestic violence on numerous occasions in tribal

court but faced only repeated misdemeanor-level punishment. *Ibid.* Judge Owens emphasized that the panel's decision had effectively "wiped this important statute off the books" and had "torn a massive gap in the fragile network that protects tribal women and their children from generations of abuse." *Id.* at 41a.

Judge Owens further explained that the panel's decision was incorrect because an uncounseled misdemeanor conviction is valid even if an accompanying sentence of imprisonment is not. Pet. App. 42a. "By holding that an unquestionably valid misdemeanor conviction is invalidated by the imposition of a prison sentence," Judge Owens stated, "the panel splits with every circuit to seriously consider this issue." *Id.* at 41a.

c. Judge O'Scannlain authored a separate dissent from the denial of rehearing en banc. Pet. App. 44a-54a. The panel's decision, he explained, "contravenes * * * *Nichols v. United States* * * * and, ultimately, holds tribal courts in contempt for having the audacity to follow the law as it is, rather than the law as [the panel] think[s] it should be." *Id.* at 45a. As Judge O'Scannlain observed, "[b]oth Nichols's and [respondent's] uncounseled convictions comport with the Sixth Amendment, and for *the same reason*: the Sixth Amendment right to appointed counsel did not apply to either conviction." *Id.* at 50a (internal quotation marks omitted). Judge O'Scannlain deemed it irrelevant that "the prior tribal court proceedings *would* have violated the Sixth Amendment *if* they were in state or federal court" because "using a federal recidivist statute to prosecute [respondent] does not transform his prior, valid, tribal court

convictions into new, invalid, federal ones." *Ibid.* (citation and internal quotation marks omitted).

Judge O'Scannlain further emphasized that *Nichols* had necessarily held that "uncounseled convictions in general *are not* unreliable." Pet. App. 52a. "If an uncounseled but valid *state* court conviction can support a later federal prosecution under a recidivist statute," Judge O'Scannlain could not perceive why "an uncounseled but valid *tribal* court conviction cannot do the same." *Id.* at 49a. He concluded that the panel's opinion "must rest on an assumption that tribal court convictions are inherently unreliable," which "trample[s] upon the principles of comity and respect that undergird federal court recognition of tribal court judgments." *Id.* at 52a (emphasis omitted).

SUMMARY OF ARGUMENT

Reliance on valid, uncounseled tribal-court misdemeanor convictions to satisfy Section 117(a)'s predicate-offense element accords with the Constitution.

A. The Sixth Amendment does not bar the use of valid, uncounseled tribal-court misdemeanor convictions in a Section 117(a) prosecution.

1. This Court's precedents establish that the Sixth Amendment's constraints on the collateral use of a prior conviction turn on whether the entry of the conviction violated the Sixth Amendment in the prior proceeding. If it did, the conviction cannot be used subsequently because its use would perpetuate the preexisting constitutional violation and erode right-to-counsel principles. *Burgett* v. *Texas*, 389 U.S. 109, 115-116 (1967). But if an uncounseled conviction did not violate the Sixth Amendment when it was ob-

tained, it also does not violate the Sixth Amendment when it is used to prove a defendant's recidivist status in a prosecution for a subsequent offense. *Nichols* v. *United States*, 511 U.S. 738, 746-747 (1994). The use of such a conviction neither exacerbates a prior constitutional violation nor creates a Sixth Amendment defect where one did not previously exist.

2. Respondent's uncounseled tribal-court convictions did not violate the Sixth Amendment when they were obtained because the Bill of Rights does not apply to Indian tribes when they invoke their sovereign authority to conduct criminal prosecutions. Under *Burgett* and *Nichols*, it follows that the Sixth Amendment was not violated when the government relied on those valid convictions to prove Section 117(a)'s predicate-offense element.

3. In holding to the contrary, the court of appeals reasoned that respondent's tribal-court convictions would have violated the Sixth Amendment had they been obtained in state or federal court because respondent was sentenced to imprisonment and the Sixth Amendment, where it applies, guarantees a right to appointed counsel in a misdemeanor prosecution resulting in actual imprisonment. But the court identified no reason to distinguish uncounseled convictions that do not violate the Sixth Amendment because it does not apply in the jurisdiction from uncounseled convictions that do not violate the Sixth Amendment for other reasons—for example, because the defendant was not imprisoned, was not entitled to appointed counsel because he was not indigent, or had waived his right to appointed counsel. And, in any event, the court erred in believing that respondent's uncounseled convictions would have been unlawful if imposed in

state or federal court, because the Sixth Amendment does not bar entry of an uncounseled misdemeanor conviction, but rather only any accompanying sentence of imprisonment.

4. Nor can "the Sixth Amendment's core interest in reliability" justify the court of appeals' holding. Pet. App. 36a (Paez, J., concurring in the denial of rehearing en banc). *Scott* v. *Illinois*, 440 U.S. 367 (1979), and *Nichols*, 511 U.S. 738, demonstrate that uncounseled misdemeanor convictions are not deemed categorically unreliable, but instead may be used to establish guilt beyond a reasonable doubt, impose a criminal fine, and subject the defendant to a variety of collateral consequences—including being classified as a recidivist in a subsequent proceeding.

It would make little sense to treat a tribal-court misdemeanor conviction as categorically unreliable if the tribal court imposed a sentence of imprisonment, but not if it imposed a lesser penalty such as a fine. In the latter circumstance, the Ninth Circuit's rationale would permit reliance on an uncounseled tribal-court misdemeanor conviction because the defendant would not have had a right to appointed counsel had he been prosecuted in state or federal court. But the tribal court's sentencing determination does not render the underlying uncounseled conviction any more or less reliable. The court of appeals' Sixth Amendment holding accordingly cannot be justified based on imputing unreliability to uncounseled tribal-court findings of guilt.

B. The Due Process Clause likewise does not preclude reliance on an uncounseled tribal-court misdemeanor conviction to prove Section 117(a)'s predicate-offense element.

1. Congress has broad authority to define criminal offenses and to make the fact of a prior conviction an element of an offense. Even though Congress is presumed to be aware that tribal-court defendants do not have a right to counsel equivalent to the Sixth Amendment right, Congress has made all tribal-court convictions qualifying predicates for a prosecution under Section 117(a). That legislative choice must be upheld unless it lacks a rational basis. *Lewis* v. *United States*, 445 U.S. 55, 66 (1980).

2. Congress could rationally conclude that permitting tribal-court convictions to satisfy Section 117(a)'s predicate-offense element was essential to its effort to combat domestic violence in Indian country. Excluding uncounseled tribal-court convictions resulting in imprisonment would have left the statute significantly less effective in deterring and punishing habitual offenders. Congress enacted Section 117(a) in response to an epidemic of domestic violence in Indian country and a jurisdictional void that permitted repeat offenders—who often were subject only to tribal misdemeanor jurisdiction—to escape felony-level sanctions again and again. In making a predictive judgment about the class of offenders who are most likely to perpetuate the cycle of violence in Indian country, Congress could rationally rely on the fact that an offender had at least two prior tribal-court convictions for domestic violence, whether or not those convictions were counseled and whether or not they resulted in imprisonment.

3. Respondent is wrong to suggest that speculation about unreliability in tribal-court convictions renders Congress's judgment irrational. This Court's precedents foreclose the argument that uncounseled state

and federal convictions are necessarily unreliable—and no reason justifies a different conclusion with respect to uncounseled tribal-court convictions. That is all the more true in light of the procedural protections tribal-court defendants enjoy under ICRA, which, among other things, guarantees due process and permits defendants to seek habeas corpus review of their tribal-court convictions in federal court. Principles of comity—which do not require a foreign tribunal to offer procedural protections identical to those of U.S. courts—further demonstrate that Congress rationally decided that tribal-court convictions are worthy of respect.

4. Respondent's categorical unreliability argument is refuted by the facts here, which leave no doubt that respondent repeatedly committed acts of domestic violence on the Northern Cheyenne Indian Reservation. Due process principles provide no basis for foreclosing a Section 117(a) prosecution against offenders like respondent, whose tribal-court convictions reliably indicate guilt and attest to the pressing need for federal intervention to deter and punish domestic violence in Indian country.

ARGUMENT

SECTION 117(a) IS CONSTITUTIONAL AS APPLIED TO OFFENDERS WHO HAVE VALID, UNCOUNSELED TRIBAL-COURT MISDEMEANOR CONVICTIONS

Congress enacted 18 U.S.C. 117(a) in recognition of the pervasive problem of domestic violence in Indian country, with the purpose of "decreas[ing] the incidence of violent crimes against Indian women" and "ensur[ing] that perpetrators of violent crimes committed against Indian women are held accountable for their criminal behavior." VAWA Reauthorization Act

§ 902(1) and (3), 119 Stat. 3077-3078. In support of those goals, Congress authorized prosecution of offenders who commit a domestic assault in Indian country and who have at least two prior final convictions for domestic violence in "Indian tribal court proceedings." 18 U.S.C. 117(a) (Supp. II 2014).

The Ninth Circuit held that the statute is unconstitutional as applied to repeat offenders who have prior, uncounseled tribal-court misdemeanor convictions that resulted in imprisonment. That holding is erroneous. Nothing in the Constitution prohibits reliance on valid tribal-court misdemeanor convictions, whether or not they were counseled and whether or not they resulted in imprisonment, to prove the predicate-offense element in a Section 117(a) prosecution. The Ninth Circuit's decision contravenes this Court's precedent and frustrates Congress's clear intention to combat the recurring and entrenched problem of domestic violence in Indian country.

A. The Sixth Amendment Does Not Preclude Reliance On Valid, Uncounseled Tribal-Court Misdemeanor Convictions To Prove Section 117(a)'s Predicate-Offense Element

This Court's precedents establish that a conviction that did not violate the Sixth Amendment when it was obtained also does not violate the Sixth Amendment when it is used to prove a defendant's recidivist status in a subsequent proceeding. Respondent's tribal-court convictions were validly entered in accordance with tribal and federal law. The court of appeals accordingly erred in holding that the Sixth Amendment prohibited their use in his Section 117(a) prosecution.

1. This Court's decisions establish that an uncounseled conviction that did not violate the Sixth Amendment when it was obtained also does not violate the Sixth Amendment when it is used in a subsequent proceeding

a. The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence." U.S. Const. Amend. VI. In *Gideon* v. *Wainwright*, 372 U.S. 335, 344-345 (1963), the Court held that the Sixth Amendment encompasses the right to appointment of counsel for indigent defendants in felony prosecutions, unless the defendant knowingly and intelligently waives that right. See also *Johnson* v. *Zerbst*, 304 U.S. 458, 463 (1938). In *Argersinger* v. *Hamlin*, 407 U.S. 25, 37 (1972), the Court extended that right to misdemeanors that result in imprisonment. See *id.* at 40 ("Under the rule we announce today, every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed * * * unless the accused is represented by counsel."). The *Argersinger* Court anticipated that the "run of misdemeanors w[ould] not be affected" by that extension because many misdemeanor prosecutions do not result in a sentence of incarceration. *Ibid.* "But in those that end up in the actual deprivation of a person's liberty," the Court observed, "the accused will receive the benefit of 'the guiding hand of counsel' so necessary when one's liberty is in jeopardy." *Ibid.* (citation omitted).

In *Scott* v. *Illinois*, 440 U.S. 367 (1979), the Court confirmed that the Sixth Amendment guarantees an indigent defendant's right to appointed counsel in

misdemeanor prosecutions only when a term of imprisonment is imposed. *Id.* at 373-374. The defendant in *Scott* was convicted of theft in state court and fined $50. *Id.* at 368. This Court rejected his argument that the State was required to provide counsel at its expense because imprisonment was authorized, although not ultimately imposed, for his theft offense. *Id.* at 368, 373-374. As the Court explained, "the central premise of *Argersinger*—that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment—is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel." *Id.* at 373. Accordingly, the Court held "that the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense." *Id.* at 373-374; see *Alabama* v. *Shelton*, 535 U.S. 654, 672 (2002) (holding that "actual imprisonment" includes the imposition of a suspended sentence of imprisonment).

b. In a series of decisions, this Court has considered whether the Sixth Amendment permits reliance on an uncounseled conviction in a subsequent prosecution. That question first arose in *Burgett* v. *Texas*, 389 U.S. 109 (1967), in which the State sought to use an uncounseled felony conviction obtained in violation of *Gideon* to subject the defendant to enhanced penalties for a subsequent crime under a recidivist statute. *Id.* at 111, 114. The Court observed that it had frequently adopted rules requiring the exclusion of evidence obtained in violation of constitutional rights, and it

held that "[t]he same result must follow" with respect to evidence of convictions obtained in violation of the right to counsel. *Id.* at 114 (discussing exclusionary rules designed to protect against coerced confessions, Fourth Amendment search-and-seizure violations, and Confrontation Clause violations). As the Court explained, it would "erode the principle of [*Gideon*]" to permit the constitutionally infirm prior conviction "to be used against a person either to support guilt or enhance punishment for another offense." *Id.* at 115. "[S]ince the defect in the prior conviction was denial of the right to counsel," the Court observed, "the accused in effect suffers anew from the deprivation of that Sixth Amendment right." *Ibid.*

In *United States* v. *Tucker*, 404 U.S. 443, 447-449 (1972), the Court applied that principle to hold that a sentence based in part on uncounseled prior convictions obtained in violation of *Gideon* must be set aside. Since then, the Court has adhered to the view that a conviction invalid under *Gideon* may not be used in recidivist sentencing. See *Custis* v. *United States*, 511 U.S. 485, 495 (1994) (recognizing "unique constitutional defect" in a *Gideon* violation, permitting collateral attack in recidivism proceedings); see also *Lewis* v. *United States*, 445 U.S. 55, 60 (1980); cf. *Loper* v. *Beto*, 405 U.S. 473, 483-484 (1972) (plurality opinion) (relying on *Burgett* to hold that the use of a prior conviction obtained in violation of *Gideon* to impeach the defendant's credibility violated due process).

After *Burgett*, the Court confronted the question whether an uncounseled misdemeanor conviction that was valid because only a fine was imposed could be used to enhance a later sentence of imprisonment for a subsequent crime. Initially, a fractured and divided

Court answered that question "no." *Baldasar* v. *Illinois*, 446 U.S. 222, 222-224 (1980) (per curiam). But the Court later overruled that decision and answered "yes," holding in *Nichols* v. *United States*, 511 U.S. 738 (1994), that an uncounseled state misdemeanor conviction that did not violate the Sixth Amendment at the time it was obtained also did not violate the Sixth Amendment when it was used to enhance a defendant's punishment for a later offense. *Id.* at 748-749. The defendant in *Nichols* had been previously convicted, without the aid of counsel, of a state misdemeanor, for which he was fined but not imprisoned. *Id.* at 740-741. Because the defendant had not been incarcerated, the Court observed that "the Sixth Amendment right to counsel did not obtain" in the state prosecution. *Id.* at 746. The "logical consequence," the Court explained, was that the valid, uncounseled prior conviction could be used to increase the defendant's sentence for a subsequent crime, "even though" the sentence for that later crime "entail[ed] imprisonment." *Id.* at 746-747.

In so concluding, *Nichols* emphasized that the sentence of imprisonment in the subsequent prosecution could not be attributed to the prior, uncounseled state misdemeanor conviction. "Enhancement statutes," the Court explained, "whether in the nature of criminal history provisions such as those contained in the Sentencing Guidelines, or recidivist statutes that are commonplace in state criminal laws, do not change the penalty imposed for the earlier conviction." 511 U.S. at 747. Rather, such repeat-offender laws "penaliz[e] only the last offense committed by the defendant." *Ibid.* (citation omitted) (citing *Moore* v. *Missouri*, 159 U.S. 673, 677 (1895), and *Oyler* v. *Boles*, 368 U.S. 448,

451 (1962)); see, *e.g.*, *United States* v. *Rodriquez*, 553 U.S. 377, 386 (2008) ("When a defendant is given a higher sentence under a recidivism statute * * * 100% of the punishment is for the offense of conviction. None is for the prior convictions or the defendant's 'status as a recidivist.'") (citation omitted). Thus, *Nichols* held that "consistent with the Sixth and Fourteenth Amendments of the Constitution, * * * an uncounseled misdemeanor conviction, valid under *Scott* because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction." 511 U.S. at 748-749.

That holding, *Nichols* recognized, was inconsistent with the splintered decisions in *Baldasar*, which had concluded, without agreeing on a rationale, that a prior uncounseled misdemeanor conviction that was valid under *Scott* because only a fine was imposed could nevertheless not be used to establish a defendant's recidivist status in a subsequent prosecution that had resulted in imprisonment. *Baldasar*, 446 U.S. at 223-224. Dissenting in *Baldasar*, Justice Powell observed that the majority's result "ignore[d] the significance of the constitutional validity of [the defendant's] first conviction" and "misapprehend[ed] the nature of enhancement statutes," which "do not alter or enlarge a prior sentence." *Id.* at 232. The majority's rule was "analytically unsound," Justice Powell explained, because it "create[d] a special class of uncounseled misdemeanor convictions" that "are valid for the purposes of their own penalties" but "invalid for the purpose of enhancing punishment upon a subsequent misdemeanor conviction." *Id.* at 232, 234. The *Nichols* Court "agree[d] with the dissent in *Baldasar*" that "a logical consequence of the holding [in

Scott] is that an uncounseled conviction valid under *Scott* may be relied upon to enhance the sentence for a subsequent offense." 511 U.S. at 746-747. The Court accordingly "adhere[d] to *Scott* * * * and overrule[d] *Baldasar.*" *Id.* at 748.

c. As lower courts have recognized, the rule that a prior conviction may be used in a subsequent prosecution if the conviction was lawful under the Sixth Amendment applies in a range of circumstances where a defendant is validly convicted without the aid of counsel. For example, courts have held that an uncounseled conviction that resulted in imprisonment may subsequently be relied upon if the defendant waived his right to appointed counsel in the prior prosecution. See, *e.g.*, *United States* v. *Feliciano*, 498 F.3d 661, 666 (7th Cir. 2007) (stating that "uncounseled cases resulting in imprisonment" that were "based on a valid waiver of the right to counsel" can be used later without "rais[ing] constitutional concerns"); *United States* v. *Early*, 77 F.3d 242, 245 (8th Cir. 1996) (per curiam) ("[A] state conviction which is uncounseled may be used to enhance a sentence as long as counsel was validly waived or was not otherwise constitutionally required."); *United States* v. *Unger*, 915 F.2d 759, 761-762 (1st Cir. 1990) (holding that the fact that a conviction "was uncounseled does not render it invalid; if the right to counsel was made clear, and was sentiently waived, the absence of counsel would not in and of itself forestall use of the ensuing conviction in tabulating the defendant's criminal history score"), cert. denied, 498 U.S. 1104 (1991).

Similarly, a defendant who was not entitled to appointed counsel in a prior proceeding because he was not indigent and who elected not to retain counsel

cannot rely on the Sixth Amendment to preclude the use of the prior conviction in a subsequent prosecution. See, *e.g.*, *United States* v. *Moles*, 79 Fed. Appx. 179, 180 (6th Cir. 2003) (permitting enhancement based on prior uncounseled convictions that resulted in imprisonment because the defendant was not indigent and chose "not to retain private counsel in the two [prior] cases"); *United States* v. *Enriquez*, 106 F.3d 414 (10th Cir. 1997) (Tbl.), 1997 WL 31567, at *2 (holding that a sentence enhancement based on a prior uncounseled conviction was permissible "in light of defendant's own sworn statement [that] he was not indigent and was able to employ counsel"); *Moore* v. *Jarvis*, 885 F.2d 1565, 1572 (11th Cir. 1989) ("[A] non-indigent defendant who eschews representation by retained counsel in one criminal proceeding has no claim * * * when, in a subsequent proceeding, the state offers a conviction obtained in the first proceeding as the predicate for an enhanced penalty under a repeat-offender statute.").

Courts have applied the same principle to uncounseled civil adjudications, where no Sixth Amendment right exists: a "valid [but uncounseled] judgment entered in [a] civil proceeding may provide the basis for treating [a defendant] as a third offender and subjecting him to the criminal penalties provided by" a recidivist statute. *Schindler* v. *Clerk of Cir. Ct.*, 715 F.2d 341, 347 (7th Cir. 1983), cert. denied, 465 U.S. 1068 (1984); see, *e.g.*, *State* v. *Lafountain*, 628 A.2d 1243, 1244-1246 (Vt. 1993) (rejecting argument that reliance on uncounseled civil adjudications in a criminal prosecution for a third offense violated the defendant's "constitutional rights to counsel and due process"); cf. Sentencing Guidelines § 4A1.3(a)(2)(C)

(identifying "[p]rior similar misconduct established by a civil adjudication" as a possible basis for an upward departure at sentencing).[5]

In sum, the Sixth Amendment analysis of the collateral use of a prior conviction turns not on whether the defendant had counsel in the prior proceeding or on whether he was imprisoned without the aid of counsel; instead, it hinges on whether the entry of the conviction violated the Sixth Amendment in the prior proceeding. If it did not—either because the Sixth Amendment did not apply or because the right to counsel was validly waived—no Sixth Amendment barrier prevents the use of the conviction in a subsequent prosecution.

2. Because respondent's prior tribal-court convictions were not obtained in violation of the Sixth Amendment, that Amendment does not preclude their use in a Section 117(a) prosecution

Respondent's multiple tribal-court misdemeanor convictions for domestic violence indisputably did not violate the Sixth Amendment when they were obtained. See Pet. App. 7a-8a (observing that respondent's "prior uncounseled tribal court convictions that resulted in terms of imprisonment are not unconstitutional, and [respondent] does not contend otherwise"); Br. in Opp. 6 ("Respondent did not contend his tribal court convictions were unconstitutional."). Because "the Bill of Rights does not apply to Indian tribal

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[5] Of course, a civil adjudication may be constitutionally invalid for other reasons (for example, a contempt finding premised on an indigent defendant's inability to pay a fine). But lack of appointed counsel does not prevent a court from considering the adjudication in later criminal proceedings.

governments" when they act in their sovereign capacity to conduct criminal prosecutions, *Duro* v. *Reina*, 495 U.S. 676, 693 (1990), "the Sixth Amendment right to counsel d[oes] not obtain" in those proceedings. *Nichols*, 511 U.S. at 746. The Northern Cheyenne Tribal Court accordingly lawfully convicted respondent without providing the assistance of counsel at the Tribe's expense.

Under *Burgett* and *Nichols*, it follows that the subsequent use of respondent's valid tribal-court convictions in a Section 117(a) prosecution does not contravene the Sixth Amendment. *Burgett*'s rule prohibiting the collateral use of convictions obtained in violation of *Gideon* has no application to tribal-court proceedings because *Gideon* does not govern those proceedings. Accordingly, no right-to-counsel "defect in the prior conviction" is being exploited to make the defendant "suffer[] anew" from a prior violation. *Burgett*, 389 U.S. at 115. Nor does the use of the tribal-court conviction expose *Gideon* to "serious erosion." *Id.* at 116. Reliance on a valid, uncounseled tribal-court misdemeanor conviction in a Section 117(a) prosecution "cannot violate 'anew' the Sixth Amendment" or erode its protections "because the Sixth Amendment was never violated in the first instance." *United States* v. *Shavanaux*, 647 F.3d 993, 998 (10th Cir. 2011) (quoting *Burgett*, 389 U.S. at 115), cert. denied, 132 S. Ct. 1742 (2012). Because uncounseled tribal-court convictions are valid for purposes of imposing punishment in tribal-court proceedings, *Nichols* demonstrates that such convictions remain valid under the Sixth Amendment when used in a Section 117(a) prosecution.

The absence of any Sixth Amendment defect is underscored by the absence of any proceeding in which respondent was entitled to, but was denied, the right to appointed counsel. As respondent concedes, he did not suffer a right-to-counsel violation at the time he was convicted of domestic violence in tribal court. See Pet. App. 7a-8a. Nor can a Sixth Amendment violation be imputed to that case retrospectively because the United States later relied on the valid tribal-court conviction in a subsequent prosecution; as *Nichols* demonstrates, respondent's federal sentence cannot be attributed to his prior, uncounseled tribal-court convictions. And respondent cannot contend that he was denied his right to counsel in the federal proceedings, because he was represented by appointed counsel at every critical stage. Thus, no proceeding exists in which a Sixth Amendment violation can plausibly be found.

3. The Ninth Circuit's rationales for finding a Sixth Amendment violation lack merit

The court of appeals observed that respondent's tribal-court convictions resulted in imprisonment and that respondent accordingly would have been entitled to appointed counsel had those prosecutions occurred in state or federal court. Pet. App. 8a. Relying heavily on the prior circuit decision in *United States* v. *Ant*, 882 F.2d 1389 (9th Cir. 1989), the court found it constitutionally impermissible to use the tribal-court convictions in a Section 117(a) prosecution because the tribal court had not "afforded the same right to counsel as guaranteed by the Sixth Amendment in federal and state prosecutions." Pet. App. 16a. That analysis is erroneous.

a. The court of appeals believed the result in this case was dictated by *Ant*, which held that an uncounseled tribal-court guilty plea that resulted in imprisonment could not be used as evidence in a later federal prosecution for the same conduct, see 882 F.2d at 1394-1395. Pet. App. 12a-13a, 15a ("we are bound by *Ant*"); *id.* at 16a ("we reiterate *Ant*'s continued vitality"). But *Ant* relied in part on the then-extant holding in *Baldasar* that a valid, uncounseled misdemeanor conviction could not be used to support imprisonment in a subsequent proceeding. See *Ant*, 882 F.2d at 1394. Reasoning that it was necessary to "look[] beyond the validity of the tribal conviction," *Ant* concluded that the subsequent use of the conviction was impermissible: the defendant, *Ant* believed, was "in jeopardy of being imprisoned by a federal court because of a prior uncounseled guilty plea." *Id.* at 1394, 1396.

Ant was decided before the *Nichols* Court overruled *Baldasar*. And *Nichols* abrogated *Ant*'s rationale. Under *Nichols*, the validity of the prior conviction under the Sixth Amendment determines whether that Amendment constrains the subsequent use of the conviction. *Nichols* also reaffirmed the longstanding rule that the punishment meted out in a recidivist prosecution cannot be attributed to a prior conviction, such that the defendant is not being imprisoned "because of" the prior events. *Ant*, 882 F.2d at 1394. The court of appeals accordingly erred by "reiterat[ing] *Ant*'s continued vitality" and extending its holding to cover Section 117(a)'s predicate-offense element. Pet. App. 16a.[6]

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[6] *Ant* is distinguishable in any event because the government there sought to use the defendant's tribal-court guilty plea to

b. The court of appeals reasoned that the rule adopted in *Nichols* did not extend to this case because "*Nichols* involved a prior conviction that did comport with the Sixth Amendment, whereas this case involves prior convictions obtained under procedures that, if utilized in state or federal court, would have violated the Sixth Amendment." Pet. App. 12a (citation omitted); see Br. in Opp. 14-15. But as Judge O'Scannlain observed in his dissent from the denial of rehearing en banc, "the court's argument is illogical" because "[b]oth Nichols's and [respondent's] uncounseled convictions 'comport' with the Sixth Amendment, and for *the same reason*: the Sixth Amendment right to appointed counsel did not apply to either conviction." Pet. App. 50a.

The court of appeals identified no reason to distinguish prior uncounseled convictions that do not violate the Sixth Amendment because of the inapplicability of the Sixth Amendment to that jurisdiction from prior uncounseled convictions that do not violate the Sixth Amendment for other reasons—for example, because the defendant was not imprisoned, validly waived his right to counsel, was not indigent, or sustained the prior adjudication in a civil proceeding. Whether the

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establish his guilt of the same conduct in a federal prosecution. In contrast, the government in a Section 117(a) prosecution need only prove the fact of a defendant's prior tribal-court domestic violence convictions, without relitigating whether the underlying conduct occurred. The government must further independently establish that the defendant is guilty beyond a reasonable doubt of the separate, federally charged assaultive conduct. Unlike in *Ant*, it cannot rely on the prior tribal-court convictions as direct proof to carry that burden. Thus, even if *Ant* were still "good law," Pet. App. 13a, it would not control the constitutionality of Section 117(a).

conviction is valid because it was obtained in tribal court or because the Sixth Amendment did not apply on some other ground, its use will not exacerbate a prior constitutional violation. Nor would exclusion of the conviction prevent erosion of right-to-counsel principles, given that the defendant was not denied a right to counsel in the prior proceedings. The court of appeals' limitation on *Nichols* therefore has no basis in logic or in this Court's precedent.

c. Focusing on the sentences of imprisonment respondent received in tribal court, the court of appeals ruled that his Section 117(a) prosecution violated the Sixth Amendment because "even after *Nichols*, uncounseled convictions that resulted in imprisonment generally could not be used in subsequent prosecutions." Pet. App. 13a. But the court's premise that the validity of a misdemeanor *conviction* is tied to the sentence imposed is flawed. Even where it applies, the Sixth Amendment does not bar entry of an uncounseled misdemeanor conviction, but only any accompanying sentence of imprisonment. Thus, whether obtained in tribal, state, or federal court, an uncounseled misdemeanor conviction is constitutionally valid, both in its own right and for use in a subsequent proceeding, even if the sentence of imprisonment is not.

That conclusion follows from *Scott*, which made clear that the Sixth Amendment does not require appointment of counsel to adjudicate the *guilt* of an indigent misdemeanor defendant. 440 U.S. at 373-374. Rather, appointed counsel is required only if the defendant is *sentenced* to a term of imprisonment. See *id.* at 373 ("actual imprisonment [is] the line defining the constitutional right to appointment of counsel"). *Scott* does not license jurisdictions to dispense with

appointed counsel in all misdemeanor cases, and a jurisdiction may elect to preserve the possibility of a sentence of imprisonment by appointing counsel generally in misdemeanor cases. But because "the Sixth Amendment protects an uncounseled misdemeanor defendant not from a judgment of conviction but from the imposition" of imprisonment, the "appropriate remedy for a *Scott* violation * * * is vacatur of the invalid portion of the sentence, and not reversal of the conviction itself." *United States* v. *Ortega*, 94 F.3d 764, 769 (2d Cir. 1996); see *United States* v. *Morrison*, 449 U.S. 361, 364 (1981) ("Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests."). Thus, even when a sentence of imprisonment violates the Sixth Amendment, a misdemeanor defendant's uncounseled conviction remains valid. See, *e.g.*, *United States* v. *Acuna-Reyna*, 677 F.3d 1282, 1284-1285 (11th Cir.), cert. denied, 133 S. Ct. 342 (2012); *United States* v. *Reilley*, 948 F.2d 648, 654 (10th Cir. 1991); *United States* v. *White*, 529 F.2d 1390, 1391, 1394 & n.4 (8th Cir. 1976); *Ex parte Shelton*, 851 So. 2d 96, 102 (Ala. 2000), aff'd, 535 U.S. 654 (2002); but see *United States* v. *Eckford*, 910 F.2d 216, 218 (5th Cir. 1990) (stating in dicta without analysis that "[i]f an uncounseled defendant is sentenced to prison, the conviction itself is unconstitutional").

Given the nature of the right to counsel in misdemeanor prosecutions, the Sixth Amendment should not preclude the use of an uncounseled conviction in a subsequent proceeding, even if the sentence in the prior proceeding was unconstitutional. See, *e.g.*, *Orte-*

ga, 94 F.3d at 769-770 (concluding that even if an uncounseled misdemeanant's sentence violated the Sixth Amendment, his conviction was "properly considered in his criminal history pursuant to *Nichols*"); accord *Acuna-Reyna*, 677 F.3d at 1284-1285; *United States* v. *Jackson*, 493 F.3d 1179, 1183-1184 (10th Cir. 2007); see also *Iowa* v. *Tovar*, 541 U.S. 77, 88 n.10 (2004) (acknowledging but reserving judgment on the issue). As Judge Owens observed, "[b]y holding that an unquestionably valid misdemeanor conviction is invalidated by the imposition of a prison sentence, the [court of appeals] split[] with every circuit to seriously consider this issue." Pet. App. 41a.

The Ninth Circuit's holding was therefore wrong even on its own (erroneous) reasoning that a court should look past the validity of the tribal convictions in tribal court. The court thought that respondent's "prior tribal court domestic abuse convictions would have violated the Sixth Amendment had they been obtained in state or federal court." Pet. App. 8a. But Section 117(a) is concerned with the fact of the tribal-court conviction, not the sentence respondent received, and his misdemeanor *convictions* would be valid in state and federal court, even if the accompanying sentences of imprisonment would not. The Sixth Amendment therefore should not preclude reliance on the convictions in a Section 117(a) prosecution.

4. Concerns about the reliability of uncounseled tribal-court convictions cannot create a Sixth Amendment violation where one did not previously exist

Although the court of appeals did not ground its decision in concerns about the reliability of uncoun-

seled tribal-court convictions, Judge Paez's concurrence in the denial of rehearing en banc suggested that the court's holding could be justified in light of "the Sixth Amendment's core interest in reliability." Pet. App. 36a. But the Sixth Amendment protects reliability interests by enumerating specific procedural safeguards. If a defendant cannot claim entitlement to one of those enumerated rights, as respondent cannot here, he cannot invoke the systemic interest in reliability as a basis to conclude that the Sixth Amendment was violated. See *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 146 (2006) (observing that the Sixth Amendment "commands, not that a trial be fair, but that * * * particular guarantee[s] of fairness be provided").[7]

a. This Court's precedents foreclose the argument that the Sixth Amendment prohibits reliance on valid, uncounseled convictions because of reliability concerns. The Court has correctly emphasized that the right to appointed counsel enhances the fairness and accuracy of state and federal criminal proceedings. See, *e.g.*, *Johnson*, 304 U.S. at 463; *Gideon*, 372 U.S. at 344; *Shelton*, 535 U.S. at 667. But the decisions in *Scott* and *Nichols* establish that a reliable and valid determination of guilt can be obtained in misdemeanor proceedings even without appointed counsel. As noted above, *Scott* upheld the constitutional validity of an uncounseled misdemeanor conviction in state or federal court that resulted only in a fine. The *Scott* Court thus necessarily recognized that such convictions are

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[7] To the extent that Judge Paez's concerns invoke due process principles, Congress's decision to permit reliance on uncounseled tribal-court convictions in a Section 117(a) prosecution does not offend due process. See pp. 41-58, *infra*.

sufficiently reliable to establish guilt beyond a reasonable doubt, to support imposition of a criminal fine, and to subject the defendant to the stigma and collateral civil consequences that accompany a criminal conviction.

Nichols further underscores the point by permitting reliance on valid, uncounseled convictions to establish a defendant's status as a recidivist in a subsequent prosecution. The Court in *Nichols* recognized the argument—pressed by three Justices in *Baldasar* and the dissenting opinion in *Nichols* itself—that "an uncounseled misdemeanor conviction is 'not sufficiently reliable' to support imprisonment" and "'does not become more reliable merely because the accused has been validly convicted of a subsequent offense.'" 511 U.S. at 744 (quoting *Baldasar*, 446 U.S. at 227-228 (Marshall, J., concurring)); *id.* at 757-758 (Blackmun, J., dissenting) (expressing the view that "prior uncounseled misdemeanor conviction[s]" are not "sufficiently reliable to justify additional jail time imposed under an enhancement statute"). But the Court in *Nichols* was not persuaded by that argument. Instead, it overruled *Baldasar* and permitted an uncounseled misdemeanor conviction that itself could not have supported imprisonment to trigger a sentencing enhancement that did. The Court thus necessarily rejected the notion that prior uncounseled misdemeanor convictions are categorically unreliable so as to violate the Constitution when used to support imprisonment in a later proceeding.[8]

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[8] Notably, a contrary view would call into question the use of *any* uncounseled conviction in a subsequent proceeding, without regard to whether the absence of counsel violated the defendant's Sixth Amendment rights. A defendant who validly waived his right to

Judge Paez sought to distinguish *Nichols* on the ground that it was "a sentencing case," whereas Section 117(a) makes prior convictions an element of the offense. Pet. App. 35a. In Judge Paez's view, "[t]he Court in *Nichols* acknowledged the reliability concerns that inhere in the Sixth Amendment right to counsel" and "affirmed the sentencing court's assessment of criminal history points under the United States Sentencing Guidelines" only "because the sentencing court used the predicate uncounseled conviction during the sentencing phase, rather than the guilt phase." *Id.* at 36a; see Br. in Opp. 15.

Nichols did observe that the rule it adopted was "consistent with the traditional understanding of the sentencing process, which [the Court] ha[d] often recognized as less exacting than the process of establishing guilt." 511 U.S. at 747. But *Nichols* did not limit its ruling to sentencing systems like the Guidelines. To the contrary, the Court acknowledged that "[e]nhancement statutes" may take the form of "criminal history provisions such as those contained in the Sentencing Guidelines, *or* recidivist statutes that are commonplace in state criminal laws." *Ibid.* (emphasis added). Whether the defendant is charged in the indictment pursuant to a recidivist statute (as in *Baldasar*) or subjected to recidivist punishment under sentencing guidelines (as in *Nichols*), the prior convictions "do not change the penalty imposed for the earlier conviction." *Ibid.* Thus, under *Nichols*, reliance

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counsel, for example, or a defendant who could have afforded counsel, could later claim that his uncounseled conviction is categorically unreliable and so cannot be used to classify him as a recidivist in a subsequent prosecution. The Sixth Amendment does not require such an extreme result.

on prior convictions cannot create a Sixth Amendment violation where one did not previously exist—and that remains true whether the convictions serve as an element of a later offense or a sentencing factor warranting enhanced punishment. That principle explains why *Nichols* did not distinguish *Baldasar*, but rather overruled it. See *id.* at 748.[9]

Nor does logic support limiting *Nichols* to the sentencing context. Whether a prior conviction is introduced during the guilt phase to satisfy an element or the punishment phase to enhance a sentence, the substantive use of the conviction is the same: to establish that the defendant is a repeat offender. Although the government must prove the fact of the prior conviction beyond a reasonable doubt in a Section 117(a) prosecution, whereas it had to prove the fact of the prior conviction only by a preponderance of the evidence in *Nichols*, the standard of proof to establish the fact of conviction does not entail any inquiry into the reliability of that conviction. What counts in ei-

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[9] In an opinion concurring in the judgment in *Nichols*, Justice Souter distinguished between automatic enhancements based on recidivist status and presumptive enhancements that may be rebutted by "convinc[ing] the sentencing court of the unreliability of any prior valid but uncounseled convictions." 511 U.S. at 752. Judge Paez relied on that distinction to suggest that *Nichols* should not apply outside a sentencing context in which the defendant has an opportunity to challenge the reliability of the prior conviction. Pet. App. 36a. But the majority in *Nichols* rejected such a limitation on the rule it had announced. The statute in *Baldasar* provided for "automatic enhancement based on prior uncounseled convictions," 511 U.S. at 751 (Souter, J., concurring in the judgment), and the *Nichols* majority nevertheless expressly overruled *Baldasar*'s holding that such a statute is unconstitutional. *Id.* at 748.

ther setting is the fact that the defendant was previously convicted. Any attempt to limit *Nichols* to the sentencing context accordingly fails.

b. A Sixth Amendment holding that a tribal-court misdemeanor conviction is deemed unreliable if the tribal court imposed a sentence of imprisonment, but not if the court imposed a lesser sentence such as a fine, would also yield insupportable and incongruous results. The Ninth Circuit's reasoning would permit a fine-only tribal-court conviction to serve as a predicate offense in a Section 117(a) prosecution because the defendant would not have had a right to appointed counsel had he been prosecuted in state or federal court. See Pet. App. 16a (holding that "the [Section] 117(a) charges against [respondent] must be dismissed because at least one of his predicate tribal court domestic abuse convictions was uncounseled *and resulted in a term of imprisonment*") (emphasis added). But the sentence imposed in tribal court has no bearing on the reliability of the underlying adjudication of guilt. From the standpoint of reliability, therefore, it would be illogical to permit prosecution under Section 117(a) when a defendant did not receive prison sentences for his prior uncounseled domestic-violence tribal-court convictions, while foreclosing prosecution of defendants who did receive such sentences, *i.e.*, those defendants who likely committed more serious crimes or who were repeat offenders. This Court should decline to interpret the Sixth Amendment to require such a counterintuitive result.

B. Due Process Principles Do Not Preclude Reliance On Valid, Uncounseled Tribal-Court Misdemeanor Convictions To Prove Section 117(a)'s Predicate-Offense Element

In addition to challenging Section 117(a) on Sixth Amendment grounds, respondent argued in the district court that the statute violates due process as applied to uncounseled tribal-court misdemeanor convictions. See C.A. E.R. 34; see also *Shavanaux*, 647 F.3d at 998-1001 (considering and rejecting due process challenge to Section 117(a)). That argument lacks merit. Congress's decision to permit reliance on valid, uncounseled tribal-court misdemeanor convictions to prove Section 117(a)'s predicate-offense element satisfies due process if it is "rational[]," *Lewis* v. *United States*, 445 U.S. 55, 66 (1980), and Section 117(a) readily passes that test.

1. Congress's decision to permit uncounseled tribal-court convictions to serve as predicate offenses for a Section 117(a) prosecution is tested for rationality

a. Congress has broad authority to define the elements of criminal offenses, *Staples* v. *United States*, 511 U.S. 600, 604-605 (1994), and to make the fact of a prior conviction an element, *e.g.*, *Lewis*, 445 U.S. at 66. When Congress elects to use the fact of a defendant's prior conviction to partially define an offense, or to define the punishment for an offense, the Constitution does not require the government to independently prove the defendant's guilt of the underlying prior offense in the subsequent prosecution. Instead, when a prior conviction is made an element, the government need only prove the fact of that conviction.

b. In this case, Congress unequivocally made tribal-court convictions predicate offenses for a Section 117(a) crime, whether or not the defendant had counsel. Section 117(a) expressly states that prior convictions in "Indian tribal court proceedings" satisfy the statute's predicate-offense element. 18 U.S.C. 117(a) (Supp. II 2014). The statute provides no avenue for excluding convictions because of the lack of counsel. Cf. *Lewis*, 445 U.S. at 62, 65 (finding no right to collaterally challenge a predicate felony in a felon-in-possession prosecution on grounds that the defendant was denied counsel in the prior proceeding, and contrasting the felon-in-possession statute with other "federal statutes that explicitly permit a defendant to challenge, by way of defense, the validity or constitutionality of the predicate felony"). And Congress is presumed to be aware that tribal-court convictions frequently are uncounseled, given that the Sixth Amendment does not apply to tribal courts and ICRA does not require appointed counsel in tribal misdemeanor prosecutions. See, *e.g.*, *Mississippi* v. *AU Optronics Corp.*, 134 S. Ct. 736, 742 (2014) (reiterating the maxim that courts "presume that 'Congress is aware of existing law when it passes legislation'") (quoting *Hall* v. *United States*, 132 S. Ct. 1882, 1889 (2012)).

c. Whether viewed as a question of substantive due process or analyzed through the lens of equal protection, Congress's decision to make tribal-court convictions predicate offenses for a Section 117(a) prosecution is subject to rational-basis review. See *Lewis*, 445 U.S. at 65; *Washington* v. *Glucksberg*, 521 U.S. 702, 722, 728 (1997). As this Court explained in *Lewis*, Congress's election to define a crime in part by refer-

ence to a prior conviction is permissible under due process principles "if there is some rational basis for the statutory distinctions made . . . or . . . they have some relevance to the purpose for which the classification is made." 445 U.S. at 65 (citation and internal quotation marks omitted). Congress's focus on an individual's status as a convicted domestic-violence offender is not "based upon constitutionally suspect criteria," and the prohibition on further acts of violence does not "trench upon any constitutionally protected liberties." *Id.* at 65 n.8. Congress's judgment that Section 117(a) should cover any individual who commits an act of domestic violence in Indian country and who has at least two prior tribal-court convictions for domestic violence, whether counseled or not, must accordingly be upheld unless that judgment "cannot rationally be supported * * * with the deference that a reviewing court should give to a legislative determination that, in essence, predicts a potential for future criminal behavior." *Id.* at 67 n.9.

2. Congress could rationally conclude that permitting uncounseled tribal-court misdemeanor convictions to satisfy Section 117(a)'s predicate-offense element was essential to the effort to combat domestic violence in Indian country

Congress enacted Section 117(a) in response to an epidemic of domestic violence in Indian country and a jurisdictional void that permitted offenders to perpetuate cycles of abuse. Against that backdrop, Congress rationally—and constitutionally—concluded that federal felony prosecution was warranted for any domestic-assault offender whose prior tribal-court convictions did not deter him from future acts of violence.

a. Section 117(a) was enacted to address the "grave problem of domestic violence on tribal lands." Pet. App. 40a (Owens, J., dissenting from the denial of rehearing en banc); see Br. in Opp. 28 (acknowledging that Section 117(a) "was developed to combat a serious problem with domestic violence in tribal communities"). "American Indian and Native Alaskan women experience domestic violence at far greater rates than other American women." Cert. Amicus Br. of Nat'l Congress of Am. Indians 2; see *id.* at 4-8 (summarizing statistics). More than 45% of Indians have been victims of physical violence, rape, or stalking by an intimate partner in their lifetimes. See Nat'l Ctr. for Injury Prevention & Control, Ctrs. for Disease Control and Prevention, *National Intimate Partner and Sexual Violence Survey: 2010 Summary Report* 3, 39-40 & tbls. 4.3 & 4.4 (Nov. 2011).[10] In legislative findings accompanying Section 117(a), Congress found, *inter alia*, that "during the period 1979 through 1992, homicide was the third leading cause of death of Indian females aged 15 to 34, and 75 percent were killed by family members or acquaintances." VAWA Reauthorization Act § 901(4), 119 Stat. 3077-3078.

Recidivist abusers, moreover, are especially dangerous, because "[d]omestic violence often escalates in severity over time." *United States* v. *Castleman*, 134 S. Ct. 1405, 1408 (2014). A study by the National Institute of Justice found, for example, that women who were physically assaulted by an intimate partner averaged nearly seven physical assaults by the same partner. See Nat'l Inst. of Justice, U.S. Dep't of Justice & Ctrs. for Disease Control and Prevention, *Ex-*

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[10] http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf.

tent, Nature, and Consequences of Intimate Partner Violence: Findings from the National Violence Against Women Survey, at iv (July 2000);[11] see also, *e.g.*, *United States* v. *Skoien*, 614 F.3d 638, 644 (7th Cir. 2010) (collecting studies and observing that "[n]o matter how you slice the[] numbers, people convicted of domestic violence remain dangerous to their spouses and partners"), cert. denied, 562 U.S. 1303 (2011).

When Congress enacted Section 117(a), it was aware that Indian offenders who committed repeated acts of domestic violence against other Indians in Indian country frequently escaped felony-level punishment. ICRA at that time precluded the tribes themselves from imposing terms of imprisonment greater than one year. See 25 U.S.C. 1302(7) (2006).[12] The federal government generally could not prosecute such Indian offenders unless their violence caused death or serious bodily injury. See 18 U.S.C. 1153 (Indian Major Crimes Act); see also 18 U.S.C. 1152 (Indian Country Crimes Act) (excluding "offenses committed by one Indian against the person or property of another Indian" from coverage under Section 1152). And although some States have criminal jurisdiction over crimes involving Indians in Indian coun-

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[11] https://www.ncjrs.gov/pdffiles1/nij/181867.pdf.

[12] More than four years after Section 117(a) was enacted, Congress amended ICRA to authorize tribal courts to impose sentences of up to three years of imprisonment for a single offense, provided the courts comply with additional procedural requirements. 25 U.S.C. 1302(b) and (c). As of August 2015, only ten tribal courts were relying on that enhanced sentencing authority. See Tribal Law & Policy Inst., *Implementation Chart: VAWA Enhanced Jurisdiction and TLOA Enhanced Sentencing*, http://www.tribal-institute.org/download/VAWA/VAWAImplementationChart.pdf.

try, most do not.[13] See *Washington* v. *Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470-474 (1979); 18 U.S.C. 1162; see also Tribal Law & Policy Inst., *Final Report: Focus Group on Public Law 280 and the Sexual Assault of Native Women* 7-8 (Dec. 2007) (noting that the States that do have jurisdiction often face funding constraints that substantially limit their efforts to combat crime in Indian country).[14]

Section 117(a) was intended to close that gap by giving "federal prosecutors the ability to intervene in the cycle of violence." See 151 Cong. Rec. 9062 (2005) (statement of Sen. McCain introducing bill containing precursor to Section 117(a)). And inclusion of tribal-court domestic-violence convictions as predicate offenses was essential to accomplishing that goal because many habitual tribal offenders will not have convictions in any other jurisdiction. See *ibid.* (observing that perpetrators of domestic violence in Indian country "may escape felony charges until they seriously injure or kill someone" and that Section 117(a) addresses that problem by "creat[ing] a new Federal offense aimed at the habitual domestic violence offender and allow[ing] tribal court convictions to count for purposes of Federal felony prosecution").

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[13] Public Law 280 granted a number of States the authority to exercise general criminal jurisdiction over Indians in Indian country and made 18 U.S.C. 1152 and 1153 inapplicable in those areas. See Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588; 18 U.S.C. 1162; 28 U.S.C. 1360; see also 25 U.S.C. 1321 (procedure for additional States to assume jurisdiction); *Duro*, 495 U.S. at 680 n.1 (noting "complex patchwork" of criminal jurisdiction in Indian country).

[14] http://www.ncdsv.org/images/TLPI_FocusGroupPublicLaw280SexualAssaultNativeWomen_FinalReport_12-31-07.pdf.

In short, as the legislative findings recount, "the unique legal relationship of the United States to Indian tribes creates a Federal trust responsibility to assist tribal governments in safeguarding the lives of Indian women," and Section 117(a) aims to help fulfill that responsibility by "decreas[ing] the incidence of violent crimes against Indian women." VAWA Reauthorization Act §§ 901(6), 902(1), 119 Stat. 3078.

b. In light of its broad purpose to combat domestic violence in Indian country, Congress could rationally choose to make uncounseled tribal-court convictions predicate offenses under Section 117(a). Congress could rationally determine that offenders who have sustained multiple tribal domestic-abuse convictions, yet have not been deterred from committing that crime, pose a heightened danger to the security of persons in Indian country. Cf. *Lewis*, 445 U.S. at 67 (upholding the rationality of Congress's focus "on the mere fact of conviction * * * in order to keep firearms away from potentially dangerous persons"). The rationality of this approach is underscored by considering other options available to Congress. Congress could have created a new federal crime for any act of domestic violence in Indian country—but such a statute would fail to differentiate between more and less dangerous offenders and would vastly expand federal jurisdiction on tribal lands. Or Congress could have targeted only habitual offenders with counseled prior convictions—but such a statute would be ineffective in addressing domestic violence in Indian country because it would exclude many offenders with tribal-court misdemeanor convictions, for which no statutory or constitutional right to appointed counsel exists in the tribal proceedings. Faced with those

options, Congress reasonably chose to rely on the fact of prior domestic-violence convictions—whether counseled or not, and whether the convictions resulted in imprisonment or not—as a means of identifying the class of offenders who are most likely to perpetuate the epidemic of domestic abuse in Indian country.

Congress had sound reasons, worthy of judicial deference, see *Lewis*, 445 U.S. at 67 n.9, to determine that an individual who has twice been formally found by a tribal community to have engaged in domestic violence and who nevertheless commits another domestic-violence offense in Indian country should be exposed to federal felony prosecution and punishment. For that class of offenders, tribal remedies have proved inadequate. And even if the prior tribal convictions were uncounseled, Congress could rationally believe that the individual is "potentially dangerous" and should be subject to prosecution under Section 117(a) if he commits additional violence. *Id.* at 67. That result aids Congress's broad purpose to combat domestic violence in Indian country, both by deterring abuse through the prospect of federal prosecution and by incapacitating offenders who nonetheless commit criminal acts of abuse.

3. Congress could rationally conclude that uncounseled tribal-court misdemeanor convictions are sufficiently reliable to serve as predicate offenses for a Section 117(a) prosecution

Respondent asserts (Br. in Opp. 22) that "Congress could not rationally conclude that uncounseled convictions used in a subsequent federal prosecution as evidence of guilt [a]re reliable." That claim lacks merit.

a. At the outset, this Court's determination in *Scott* and *Nichols* that uncounseled convictions are not categorically unreliable demonstrates that Congress acted rationally in permitting reliance on uncounseled tribal-court convictions to satisfy Section 117(a)'s predicate-offense element. If uncounseled convictions in state and federal misdemeanor prosecutions are sufficiently reliable to support a finding of guilt and the imposition of a fine, and to subject the defendant to the various collateral consequences of such a conviction—including classification as a recidivist in a subsequent proceeding—then Congress could rationally conclude that uncounseled misdemeanor tribal-court convictions are likewise sufficiently reliable determinations of guilt to warrant exposure to punishment as a habitual offender under Section 117(a). See *Baldasar*, 446 U.S. at 234 n.2 (observing that an "uncounseled conviction * * * conceded to be valid * * * must be presumed reliable") (Powell, J., dissenting).[15]

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[15] Congress's judgment is bolstered by its decision to include within Section 117(a) only individuals who have been convicted on two prior occasions of the very same type of crime. The similarity between the charged and predicate domestic-violence offenses not only indicates an offender's "potential for future criminal behavior," *Lewis*, 445 U.S. at 67 n.9, but also supports the congressional judgment that the prior convictions, even if uncounseled, are fair indicators of his abusive past. Cf. *United States* v. *Drain*, 740 F.3d 426, 432 (7th Cir. 2014) (explaining that although "an arrest alone does not necessarily mean guilt," a "substantial history of arrests, especially if they are similar to the offense of conviction, can be a reliable indicator of a pattern of criminality"); *United States* v. *Port*, 532 F.3d 753, 755 (8th Cir. 2008) (approving district court's consideration of foreign convictions at sentencing because they "demonstrate[d] a clear risk of recidivism given the close relationship between [the defendant's] present offense and his prior of-

b. Moreover, when Congress enacted Section 117(a), it was aware that tribal-court defendants are entitled to an array of procedural protections pursuant to ICRA. Congress could reasonably have concluded that those statutory protections, as well as the right to federal habeas corpus review, sufficiently assure the reliability of tribal-court adjudications of guilt in misdemeanor cases.

A "central purpose" of ICRA was "to 'secur[e] for the American Indian the broad constitutional rights afforded to other Americans,' and thereby to 'protect individual Indians from arbitrary and unjust actions of tribal governments.'" *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 61 (1978) (brackets in original) (quoting S. Rep. No. 841, 90th Cong., 1st Sess. 5-6 (1967)). To that end, ICRA guarantees that a tribal-court defendant will not be "deprive[d] * * * of liberty or property without due process of law." 25 U.S.C. 1302(a)(8). A defendant accused of an offense punishable by imprisonment has the right to a jury trial, and ICRA further grants a defendant "the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense." 25 U.S.C. 1302(a)(6) and (10). ICRA also protects against compelled self-incrimination, unreasonable searches and seizures, double jeopardy, excessive bail, excessive fines, and cruel and unusual punishment. 25 U.S.C. 1302(a)(2)-(4) and (7). In addition, tribal-court defendants are entitled to seek habe-

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fenses and given [the defendant's] failure to cease [the criminal conduct] even after his incarcerations for similar offenses").

as corpus review of their convictions in federal court. 25 U.S.C. 1303.

ICRA's right-to-counsel provision does diverge from the Sixth Amendment, but that reflects Congress's judgment that a defendant may be convicted of a misdemeanor through fundamentally fair tribal-court procedures even in the absence of counsel. Notably, Congress has revisited ICRA on several occasions and has given renewed consideration to the right to counsel in tribal-court proceedings, but it has continued to decline to require a right to appointed counsel in misdemeanor proceedings. When ICRA was first enacted, tribal courts could not sentence criminal defendants to more than six months of imprisonment and a fine of $500 for one offense. See 25 U.S.C. 1302(7) (1970). In 1986, Congress increased those limits to one year of imprisonment and a $5000 fine, but made no changes to ICRA's right-to-counsel provision. See 25 U.S.C. 1302(7) (Supp. IV 1986). In 2010, Congress further revised the limits upward, authorizing tribal courts to impose a prison term of up to three years and a fine of up to $15,000 for a single offense. 25 U.S.C. 1302(a)(7)(C) (Supp. IV 2010); see Tribal Law and Order Act of 2010, Pub. L. No. 111-211, Tit. II, 124 Stat. 2261. Congress provided, however, that tribes may sentence defendants to terms of imprisonment exceeding one year only if the tribes comply with additional procedural protections, including appointing counsel for indigent defendants. 25 U.S.C. 1302(c)(2). Thus, Congress has been attuned to right-to-counsel issues in tribal proceedings and has consistently determined that appointed counsel is not necessary to safeguard the fairness of tribal-court misdemeanor prosecutions. See *Santa Clara Pueblo*,

436 U.S. at 62-63 (observing that Congress in ICRA "modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal governments"). That legislative judgment warrants respect.

c. Principles of comity fortify Congress's judgment to include tribal-court convictions as predicate offenses under Section 117(a). Tribal prosecutions reflect the tribe's inherent retained sovereignty, *United States* v. *Wheeler*, 435 U.S. 313, 329 (1978); *United States* v. *Lara*, 541 U.S. 193, 210 (2004), and a tribe's valid judgment of conviction merits at least the same respect as a judgment rendered by a foreign tribunal. See, *e.g.*, *Shavanaux*, 647 F.3d at 998 (emphasizing that courts have "analogized Indian tribes to foreign states" for purposes of determining whether to recognize tribal-court judgments); *State* v. *Spotted Eagle*, 71 P.3d 1239, 1245 (Mont.) (observing that tribal-court judgments should be treated "with the same deference as those of foreign sovereigns as a matter of comity"), cert. denied, 540 U.S. 1008 (2003); see also *Cohen's Handbook of Federal Indian Law* § 7.07[2][b], at 664 (Nell Jessup Newton et al. eds., 2012) (noting that all States that have addressed the issue grant either full faith and credit or at least some form of comity to tribal-court judgments).

This Court has previously held that federal courts may give effect to foreign judgments secured in "proceedings * * * according to the course of a civilized jurisprudence." *Hilton* v. *Guyot*, 159 U.S. 113, 205 (1895); see *id.* at 202 (comity is warranted when, *inter alia*, "there has been opportunity for a full and fair trial * * * under a system of jurisprudence likely to secure an impartial administration of justice"). A

foreign tribunal need not offer procedural protections identical to those contained in the U.S. Constitution; rather, reliance on foreign convictions is permissible so long as the convictions were obtained under a foreign legal system that is not fundamentally unfair. See, *e.g.*, 1 Restatement (Third) of Foreign Relations § 482(1)(a), at 604 (1987) (providing that U.S. courts need not recognize a foreign judgment if it "was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with due process of law").[16]

It is eminently reasonable for Congress to conclude that tribal-court proceedings conducted in conformance with ICRA—which notably guarantees defend-

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[16] Notably, federal courts have in some instances relied upon foreign convictions obtained without the assistance of counsel. See *Houle* v. *United States*, 493 F.2d 915, 916 n.2 (5th Cir. 1974) (per curiam) (holding that trial court did not err in increasing the defendant's sentence based on an uncounseled Canadian conviction, and declining to assume that the rationale for requiring appointed counsel in *Gideon* "may be the basis for a judgment that a foreign system, utilizing procedures with which we are unfamiliar, has failed to provide a fair trial if it does not conform with our right-to-counsel concepts"); see also *United States* v. *Concha*, 294 F.3d 1248, 1254 (10th Cir. 2002) (holding that the defendant's "foreign convictions * * * may be considered [at sentencing for a subsequent offense] notwithstanding the possibility that they were obtained without the assistance of counsel"), cert. denied, 537 U.S. 1145 (2003); *United States* v. *Fleishman*, 684 F.2d 1329, 1346 (9th Cir.) (holding that the district court committed no constitutional error in considering uncounseled Mexican convictions to enhance the defendants' sentences for a subsequent offense on the ground that the defendants "had been involved in drug-related offenses [in Mexico] and had not learned from their experiences"), cert. denied, 459 U.S. 1044 (1982), abrogated in part on other grounds by *United States* v. *Ibarra-Alcarez*, 830 F.2d 968 (9th Cir. 1987).

ants due process of law, see 25 U.S.C. 1302(a)(8)—are fundamentally fair, even though ICRA does not provide a right to appointed counsel in misdemeanor prosecutions that result in imprisonment. See *Shavanaux*, 647 F.3d at 1000 ("We hold that tribal convictions obtained in compliance with ICRA are necessarily compatible with due process of law."); Pet. App. 20a (Watford, J., concurring) (emphasizing that "respect for the integrity of an independent sovereign's courts should preclude [the] quick judgment" that "if the defendant lacks counsel, tribal court convictions are inherently suspect and unworthy of the federal courts' respect").

In recognition of the fact that tribal courts may fairly and reliably dispense justice, legislatures and courts have given effect to tribal-court judgments in a variety of circumstances. See Kevin K. Washburn, *Tribal Courts and Federal Sentencing*, 36 Ariz. St. L.J. 403, 435-439 (2004) (observing that tribal-court convictions have been relied upon to, *inter alia*, grant upward departures at sentencing in federal prosecutions for subsequent offenses; transfer a juvenile offender to adult status; enhance charges for state prosecutions for driving under the influence of alcohol; serve as a predicate for suspension of a driver's license; find probation violations; and require registration in sex offender databases). Principles of comity thus further demonstrate that Congress acted rationally in determining that valid tribal-court judgments are sufficiently reliable to serve as predicate offenses in a Section 117(a) prosecution.

4. The facts of this case demonstrate that uncounseled tribal-court misdemeanor convictions are not categorically unreliable

Although respondent asserts (Br. in Opp. 15) that uncounseled tribal-court convictions are "categorically unreliable," the facts of his case prove him wrong. Respondent has never suggested in this litigation that he did not actually commit the acts of domestic violence underlying his multiple tribal-court convictions for domestic assault, or that due process entitles him to collaterally challenge those convictions on grounds of actual innocence in his Section 117(a) prosecution. And for good reason: the record in this case leaves no doubt concerning respondent's status as a recidivist domestic-violence offender. As the PSR summarizes, respondent pleaded guilty in tribal court on at least five occasions to committing domestic assault. See PSR ¶ 81; cf. *United States* v. *Timmreck*, 441 U.S. 780, 784 (1979) (observing that when a defendant pleads guilty, "the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised") (citation omitted). Respondent raised no objection to the PSR's summary of the facts resulting in his tribal-court convictions, and he confirmed at sentencing that the district court "c[ould] rely upon the accuracy of the report." J.A. 41. Indeed, respondent has conceded that his prior convictions are reliable enough to permit his prosecution as a repeat offender in tribal court. Br. in Opp. 11.

The facts underlying respondent's convictions paint a devastating picture of domestic abuse. Respondent attempted to strangle one girlfriend and hit her on the head with a beer bottle. PSR ¶ 81. He kneed another

girlfriend and broke her nose. *Ibid.* As Judge Owens summarized:

> [Respondent] likes to beat women. Sometimes he kicks them. Sometimes he punches them. Sometimes he drags them by their hair. He punched and kicked one girlfriend repeatedly, threw her to the floor, and even bit her. When he could not find his keys, he choked another woman to the verge of passing out.

Pet. App. 40a. Respondent's many convictions, moreover, do not even capture the full extent of his record of domestic violence. In connection with his federal prosecution, respondent admitted that he had assaulted the victims of his most recent attacks on multiple occasions. See PSR ¶¶ 33, 35. That admission ultimately warranted a sentence enhancement pursuant to Sentencing Guidelines § 2A6.2(b)(1) (2010) for engaging in "a pattern of activity involving * * * assaulting the same victim." See PSR ¶¶ 52, 58; J.A. 42 (noting that respondent "admitted that [he] got physical with" one victim "between five and six times," in addition to the charged offense).

In short, respondent is precisely the kind of habitual offender Congress sought to include within Section 117(a). He repeatedly assaulted his intimate partners on the Northern Cheyenne Indian Reservation, but he received only misdemeanor-level punishment again and again. See Pet. App. 40a (Owens, J., dissenting from the denial of rehearing en banc) ("Although [respondent's] violence varies, his punishment never does. Despite [respondent's] brutality * * * his worst sentence was a slap on the wrist"). And that punishment did not deter him from committing yet additional acts of violence within his tribal community.

Respondent's speculation about potential unfairness in tribal-court proceedings provides no basis for categorically foreclosing a Section 117(a) prosecution based on uncounseled convictions. As this case demonstrates, tribal-court convictions, even if uncounseled, may be entered fairly, form reliable records of guilt, and attest to the pressing need for federal intervention to deter and punish domestic violence in Indian country.

Although respondent does not maintain that he was wrongfully convicted in tribal court, he asserts (Br. in Opp. 13) that uncounseled tribal-court defendants may not "appreciat[e] the penalties and disabilities their uncounseled convictions will subject them to." But the same argument was made and rejected in *Nichols*, which declined to find that "due process requires a[n] [uncounseled] misdemeanor defendant to be warned that his conviction might be used for enhancement purposes should the defendant later be convicted of another crime." 511 U.S. at 748. The *Nichols* Court reasoned that a warning that the defendant "will be treated more harshly" if "he is brought back into court on another criminal charge * * * would merely tell him what he must surely already know." *Ibid.*; see also note 4, *supra* (noting the escalating recidivist penalties that respondent faced in tribal court). Respondent's knowledge that he had multiple domestic-violence convictions in tribal court should have "serve[d] as an incentive not to commit a subsequent crime and risk" being classified as a recidivist. *Daniels* v. *United States*, 532 U.S. 374, 381 n.1 (2001). Because respondent instead chose to continue assaulting his domestic partners, he should not be heard to

complain that his actions exposed him to prosecution under Section 117(a).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. U.S. Const. Amend. V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. U.S. Const. Amend. VI provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

3. 18 U.S.C. 117 (2006) provides:

Domestic assault by an habitual offender

(a) IN GENERAL.—Any person who commits a domestic assault within the special maritime and territorial jurisdiction of the United States or Indian country and who has a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings for offenses that would be, if subject to Federal jurisdiction—

(1) any assault, sexual abuse, or serious violent felony against a spouse or intimate partner; or

(2) an offense under chapter 110A,

shall be fined under this title, imprisoned for a term of not more than 5 years, or both, except that if substantial bodily injury results from violation under this section, the offender shall be imprisoned for a term of not more than 10 years.

(b) DOMESTIC ASSAULT DEFINED.—In this section, the term "domestic assault" means an assault committed by a current or former spouse, parent, child, or guardian of the victim, by a person with whom the victim share a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, parent, child, or guardian, or by a person similarly situated to a spouse, parent, child, or guardian of the victim.

4. 18 U.S.C. 117 (Supp. II 2014) provides:

Domestic assault by an habitual offender

(a) IN GENERAL.—Any person who commits a domestic assault within the special maritime and territorial jurisdiction of the United States or Indian country and who has a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings for offenses that would be, if subject to Federal jurisdiction—

(1) any assault, sexual abuse, or serious violent felony against a spouse or intimate partner, or against a child of or in the care of the person committing the domestic assault; or

(2) an offense under chapter 110A,

shall be fined under this title, imprisoned for a term of not more than 5 years, or both, except that if substantial bodily injury results from violation under this section, the offender shall be imprisoned for a term of not more than 10 years.

(b) DOMESTIC ASSAULT DEFINED.—In this section, the term "domestic assault" means an assault committed by a current or former spouse, parent, child, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, parent, child, or guardian, or by a person similarly situated to a spouse, parent, child, or guardian of the victim.

5. 25 U.S.C. 1302 (2006) provides:

Constitutional rights

No Indian tribe in exercising powers of self-government shall—

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his

favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and[1] a fine of $5,000, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

6. 25 U.S.C. 1302 provides:

Constitutional rights

(a) In general

No Indian tribe in exercising powers of self-government shall—

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom

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[1] So in original. Probably should be "or".

of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense (except as provided in subsection (b));

(7)(A) require excessive bail, impose excessive fines, or inflict cruel and unusual punishments;

(B) except as provided in subparagraph (C), impose for conviction of any 1 offense any penalty

or punishment greater than imprisonment for a term of 1 year or a fine of $5,000, or both;

(C) subject to subsection (b), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 3 years or a fine of $15,000, or both; or

(D) impose on a person in a criminal proceeding a total penalty or punishment greater than imprisonment for a term of 9 years;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

(b) Offenses subject to greater than 1-year imprisonment or a fine greater than $5,000

A tribal court may subject a defendant to a term of imprisonment greater than 1 year but not to exceed 3 years for any 1 offense, or a fine greater than $5,000 but not to exceed $15,000, or both, if the defendant is a person accused of a criminal offense who—

(1) has been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or

(2) is being prosecuted for an offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States.

(c) Rights of defendants

In a criminal proceeding in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall—

(1) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and

(2) at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys;

(3) require that the judge presiding over the criminal proceeding—

(A) has sufficient legal training to preside over criminal proceedings; and

(B) is licensed to practice law by any jurisdiction in the United States;

(4) prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government; and

(5) maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.

(d) Sentences

In the case of a defendant sentenced in accordance with subsections (b) and (c), a tribal court may require the defendant—

(1) to serve the sentence—

(A) in a tribal correctional center that has been approved by the Bureau of Indian Affairs for long-term incarceration, in accordance with guidelines to be developed by the Bureau of Indian Affairs (in consultation with Indian tribes) not later than 180 days after July 29, 2010;

(B) in the nearest appropriate Federal facility, at the expense of the United States pursuant to the Bureau of Prisons tribal prisoner pilot

program described in section 304(c)[1] of the Tribal Law and Order Act of 2010;

(C) in a State or local government-approved detention or correctional center pursuant to an agreement between the Indian tribe and the State or local government; or

(D) in an alternative rehabilitation center of an Indian tribe; or

(2) to serve another alternative form of punishment, as determined by the tribal court judge pursuant to tribal law.

(e) Definition of offense

In this section, the term "offense" means a violation of a criminal law.

(f) Effect of section

Nothing in this section affects the obligation of the United States, or any State government that has been delegated authority by the United States, to investigate and prosecute any criminal violation in Indian country.

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[1] See References in Text note below.

7. 25 U.S.C. 1303 provides:

Habeas corpus

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

8. Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, §§ 901 and 902, 119 Stat. 3077-3078 provides:

SEC. 901. FINDINGS.

Congress finds that—

(1) 1 out of every 3 Indian (including Alaska Native) women are raped in their lifetimes;

(2) Indian women experience 7 sexual assaults per 1,000, compared with 4 per 1,000 among Black Americans, 3 per 1,000 among Caucasians, 2 per 1,000 among Hispanic women, and 1 per 1,000 among Asian women;

(3) Indian women experience the violent crime of battering at a rate of 23.2 per 1,000, compared with 8 per 1,000 among Caucasian women;

(4) during the period 1979 through 1992, homicide was the third leading cause of death of Indian females aged 15 to 34, and 75 percent were killed by family members or acquaintances;

(5) Indian tribes require additional criminal justice and victim services resources to respond to violent assaults against women; and

(6) the unique legal relationship of the United States to Indian tribes creates a Federal trust responsibility to assist tribal governments in safeguarding the lives of Indian women.

SEC. 902. PURPOSES.

The purposes of this title are—

(1) to decrease the incidence of violent crimes against Indian women;

(2) to strengthen the capacity of Indian tribes to exercise their sovereign authority to respond to violent crimes committed against Indian women; and

(3) to ensure that perpetrators of violent crimes committed against Indian women are held accountable for their criminal behavior.